

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.60 OF 2005
IN
ARBITRATION PETITION NO.58 OF 2005

UTV Software Communications Ltd. ..Appellants
(Orig.Petrns.)

Vs.

Radaan Media Works Ltd. ..Respondents.
(Orig.Respts.)

Mr.Ravi Kadam with Mr.Birendra Saraf i/b.Khaitan &
Co., Advocate for the Appellants.

Mr.Vikram Nankani i/b.M/s.Nankani & Associates for
Respondent No.1.

Mr.Shyam Diwan i/b.I.J.Nankani for Respondent No.2.

**CORAM: A.P.SHAH AND
S.J.VAZIFDAR, JJ.**

DATED: 9TH FEBRUARY, 2005

ORAL JUDGMENT : (Per S.J.Vazifdar, J.)

This is an Appeal against the order of the learned Single Judge rejecting the Appellant/Plaintiff's application under section 9 of the Arbitration and Conciliation Act, 1996.

2. An agreement dated 21.6.2001 was entered into between the Appellant/Petitioner and the Respondent. The Respondent granted and assigned to the Appellant the sole and exclusive right to market not less than

350 episodes of a Television Serial "Chithi" to be telecast over "Sun-TV" from Monday to Friday at 9.30 p.m. Under clause 11 of the agreement, the consideration payable by the Appellant was Rs.1,40,000/- net, per episode, as the cost of production per episode. This amount was to be reduced in the event of the telecast fee being reduced. The Appellant was also to pay the Respondent an advance of Rs.1,00,00,000/-. There is a detailed mode of payment and for recouping this advance of Rs.1,00,00,000/-. Clauses (a), (b) and (c) of Part-B of the agreement which falls for consideration grants a right of preemption in respect of the marketing rights of other programmes produced by the Respondent and reads as under :

"B() FIRST RIGHT OF REFUSAL BY THE PRODUCER TO UTV IN CONSIDERATION OF UTV MARKETING THE SAID PROGRAMME

a) In consideration of UTV marketing the said Programme as mentioned in point (A) above, the Producer hereby confers on UTV the first right of refusal to market any other Programme of any nature whatsoever either directly or indirectly produced by the Producer.

b) In respect of all the Programmes, the Producer shall make an offer to UTV to

exclusively market the respective programmes and give UTV fifteen days time to respond to the same.

c) In case UTV refuses to market the same or does not respond within fifteen days of receipt of the offer from the Producer, the Producer shall be allowed to market the same through any other entity. However, the terms and conditions of the offer to such entities should not be more attractive than those offered to UTV."

3. Admittedly, this contract was in subsistence upto 21.1.2005.

4(a). Pursuant to Part-B of the said agreement, correspondence ensued between the parties and, ultimately, by a letter dated 10.1.2005 i.e. during the subsistence of the agreement the Respondent informed the Appellant that it had decided to offer its forthcoming, Serial "Chelvi" on the terms and conditions mentioned therein viz. an advance of Rs.2,25,00,000/- payable in one instalment (interest free) to be adjusted at the end of the programme. The slot fee was to be as per channel's requirement with service tax. The production cost of Rs.3,00,000/- per episode was payable sixty days from the date of the telecast.

(b). The Appellant responded by its letter dated 12.10.2005 offering an advance of Rs.3,00,00,000/- payable in one instalment (interest free). However, the Appellant required that an amount of Rs.2,00,00,000/- of the advance to be adjusted from Episode - 1 for the first year and the balance Rs.1,00,00,000/- at the end of the programme. The slot fee was also as per channel's requirement with service tax. The production cost offer was Rs.3,20,000/- per episode.

5. Mr.Kadam firstly submitted that by the letter dated 12.10.2005 the Appellant validly exercised its right of pre-emption confirmed upon it by Part-B of the said agreement. He submitted that, in fact, the Appellant's offer was better than what was stipulated in the Respondent's letter of offer dated 10.1.2005. Mr.Kadam's submission to this effect is not without substance in the sense that in the ultimate analysis the amount actually paid by the Appellant to the Respondent would be more if its offer of 12.1.2005 were accepted. It is however a moot point whether merely because the counter-offer is in the ultimate analysis financially higher, the same constitutes the exercise of the right of

pre-emption in accordance with the contractual provision. For instance, though in the ultimate analysis the amount realised by the counter-offer may be higher, Respondent may require the offer to be accepted as it is in view of its own requirements in terms of its cash flow requirements during the course of the contract.

6. This is an aspect which must necessarily await the decision of the Arbitrators. We express no final opinion on it. Suffice it to state that on this ground we are not inclined to grant an injunction in exercise of our powers under section 9 of the Arbitration and Conciliation Act, 1996.

7. The next question that arises for consideration is whether the right of pre-emption in Part-B of the agreement survives the termination of the agreement. Mr.Kadam submitted that it does. He submitted that there is nothing in the clause that precludes its operation during the post-contractual period. This is also a point on which we are not inclined to grant an injunction for, prima-facie, it would amount to a contractual right in perpetuity. Though, this is also a matter to be decided by the Arbitrator, we are not inclined to enforce this

negative covenant at the interlocutory stage, in favour of the Petitioner.

8. What is important however is that the Respondent did not ultimately accept the offer referred to in the letter dated 10.1.2005. The Respondent's contention is that they entered into an agreement with one M/s.Saroj Ad Creators Pvt. Ltd. By that agreement, the Respondent allegedly sold and/or transferred to M/s.Saroj Ad Creators Pvt. Ltd., the TV Serial programme "Chelvi" with all rights, titles and interest therein. In support of this contention, the Respondent tendered in Court a letter dated 22.01.2005 i.e. the day after the termination of the Appellant's agreement. For the purpose of this Appeal and considering the view we have taken refusing to enforce the negative covenant at the interlocutory stage for the post contractual period, the only question is whether this agreement was actually entered into on 22.1.2005 or whether it was in fact entered into earlier i.e. during the subsistence of the Appellant's agreement. For it was in fact entered into prior to 22.1.2005 i.e. during the subsistence of the Appellant's agreement the Respondent was bound to permit the Appellant an opportunity to exercise its right of preemption.

9. Before we deal with this letter it is necessary to refer to two letters which preceded the same.

(a). After exercising the right of pre-emption as stated in the letter dated 12.1.2005, the Petitioner addressed a further letter dated 15.1.2005 stating that they had yet to hear from the Respondent regarding the same and were awaiting their response. The Appellant/Petitioner expressly stated as under :

"Meantime, as per the terms and spirit of the "Right of First Refusal" contained in our agreement for marketing the commercial time on "Annamalai", we request you to inform us of the terms in case any third party has offered better terms than that mentioned by us vide our mail dated 12th January, 2005 and give us an opportunity to match/better such terms offered by the third party before you contract any third party to market "Chelvi". Please note that our "right of first refusal" is valid and binding unless the same is waived by us in writing."

(b). It is also important that by their letter also dated 15.1.2005 the Respondent alleged that the Petitioners had not exercised their option despite

several opportunities and further added: "therefore we have gone ahead to finalise the offer". Regarding the Petitioner's letter dated 15.1.2005 the Respondent stated that it merely referred to the same points already dealt with and, therefore, required no explanation.

10. It is necessary at this stage to reproduce the letter allegedly dated 22.1.2005 verbatim :

Dear Sir,

Sub:Sale of TV Serial Program
"CHELVI" (Tamil)

We confirm having sold and transferred to you the TV Serial program title "CHELVI"(Tamil) will all rights, titles, and interest therein. We confirm that you are the absolute owner of the said program "CHELVI" and we have no rights, title and interest including marketing rights therein.

We have so far produced 65 Episodes and undertake to produce the balance Episodes on your behalf. It is agreed that the total consideration for the sale of the said program shall be Production Cost of Rs.1,70,000/= (Rupees One Lakh Seventy Thousands Only) per episode plus all taxes applicable as per law, payable after 90 days from the date of telecast of each episode.

The Parties agreed to reduce the terms and conditions in detail within SEVEN days from the date hereof."

11. Mr.Kadam submitted that the agreement dated 22.1.2005 is sham and bogus and purely with a view to depriving the Petitioners from exercising their right of pre-emption. Prima-facie, we find considerable force in this submission. Prima-facie, the alleged agreement is dated 22.1.2005 i.e. very next day after the termination of the Appellant's agreement appears to be post-dated for several reasons.

(a). Firstly, it is pertinent to note that by the letter dated 15.1.2005 the Respondents stated: "we have gone ahead to finalise the offer". There is admittedly no other offer than the one with M/s.Saroj Ad Creators Pvt. Ltd. Prima-facie, it appears therefore that the offer was finalised during the subsistence of the Petitioner's agreement which came to an end only on 21.1.2004. It is not the Respondent's case that they gave the Petitioner an opportunity of exercising the right of preemption in respect of the alleged agreement dated 22.1.2005.

(b). The letter dated 22.01.2005 was produced only in Court before the learned Single Judge when the application for ad-interim reliefs was made on 24.1.2005. It is pertinent to note that the papers in the present proceedings were served on the Respondents on 22.1.2005. There is no explanation as to what transpired between the mid-night of 21.1.2005 and the time when the alleged agreement dated 22.1.2005 was executed. It is quite possible that the agreement was entered into earlier but was reduced to writing on 22.1.2005.

(c). It is interesting to note that one Abhijit Gupte of M/s.Pearl Media forwarded an e-mail message to one Koshi Chacko of Media Communications India Ltd. with whom the Petitioners had business relations, stating that they had "still not signed the agreement with the producer". The message was sent on 20.1.2005 at 6.41 p.m. It must be noted that the message does not state that the agreement had not been entered into. It only states that it had not been signed.

(d). The alleged agreement dated 22.1.2005 inspires no confidence whatsoever. The consideration mentioned therein is only Rs.1,70,000/- per episode

plus all taxes. It is impossible to believe that this was the actual consideration.

Mr.Nankani, the learned counsel appearing on behalf of the Respondent admitted that it was true that the consideration was very low but, submitted that this was due to economic compulsion. He stated that the Respondent was unable to get another purchaser at a better price. He stated that the price was agreed to keeping in mind "sound economic principles based on required cash flow". To say the least, this case is not only not believable but ex-facie false. Only 10 days earlier the Petitioner itself had offered in one instalment an interest free advance payment of Rs.3,00,00,000/-. The same was to be adjusted from the production cost of Rs.3,20,000/- per episode. It requires no elaborate mathematical exercise to expose the falsity of the submission made on behalf of the Respondent. There is no explanation on behalf of the Respondent as to why it did not even enquire from the Petitioner whether it was still willing to make the same offer. This is more so in view of the fact that on 15.1.2005 the Petitioner had expressly called upon the Respondent to inform them of the terms of any other offer that the Respondent may receive in order

to enable the Appellant to meet the same. The alleged offer dated 22.1.2005 is far lower than any of the other offers referred to earlier.

12. It is also pertinent to note that there was a flyer issued by Pearl Media representing Pearl Media as presenting the said serial. Pearl Media apparently had knowledge about the Petitioner's agreement. But, Mr.Diwan, the learned counsel appearing on behalf of M/s.Saroj Ad Creators Pvt. Ltd. claimed to have a right in respect of the said television serial. It is alleged that there is a connection between Pearl Media and M/s.Saroj Ad Creators Pvt. Ltd. We do not propose to say anything on that issue at this stage. For the purpose of the present order, we refrain from doing so.

13. More important, Mr.Kadam pointed out that on television the Petitioner's name has been advertised in respect of the said serial. Further, in the said serial, the following notice is televised :

"ALL RIGHTS RESERVED

No part of this serial may be reproduced or transmitted in any form or by any means or stored

on any retrieval system of any nature without prior written permission of the producer and copyright owner M/s.Radaan Mediaworks (I) Ltd. Application for permission for use of this serial or anypart thereof including permission to produce, translate in any language shall be made to the producer copyright owner"

14. An application for adjournment was made before the learned Judge to implead M/s.Saroj Ad Creators Pvt. Ltd. as a party to the Petition. The request was made on the basis that M/s.Saroj Ad Creators Pvt. Ltd. had no right, title and interest in the serial and, even assuming that the agreement had been entered into, the same was illegal, null and void and, in breach of the rights vested in the Appellants. Mr.Diwan on the other hand stated that M/s.Saroj Ad Creators Pvt. Ltd. had already been allotted all the slots for the time during which the said serial was to be telecast prior to 21.1.2005. He was unable to produce any written confirmation from Sun TV for the same. He stated that his clients were in Madras and, therefore, the written confirmation could not be produced at the hearing before us.

15. In the aforesaid circumstances, some of which

were not and could not have been placed before the learned Judge, we are of the opinion that the Appellant ought to make a fresh application or adopt any other proceedings in the light of the above facts. This is so as neither the Appellant nor M/s.Saroj Ad Creators Pvt. Ltd. have had a full opportunity of establishing their contentions. We hasten to clarify that nothing in this order should be construed as our having held that an application under section 9 of the 1996 Act permits the grant of reliefs against parties who are not parties to the Arbitration agreement. This point is kept open.

16. Despite our prima-facie view regarding the conduct of the Respondent, we are not inclined to grant reliefs of any other nature against the Respondent as in the present Petition the same have not been prayed for. It is open to the Appellant to adopt appropriate proceedings for the same.

17. The Appeal is accordingly disposed of.